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No. 413

In the Supreme Court of the United States

OCTOBER TERM, 1958

TADASHI MIYAKI, PETITIONER

v.

ROBERT H. ROBINSON, DISTRICT DIRECTOR, CHICAGO DISTRICT, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a–2a) is reported at 257 F.2d 806. The opinion of the District Court appears at pages 73–84 of the Appendix filed in the court below.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1958. A petition for rehearing was denied

[1] "App." refers to the Appendix used in the Court of Appeals, which is included in the record of this case now on file in the Clerk's office.

September 4, 1958 (Pet. 2a). The petition for a writ of certiorari was filed on October 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the crime of burning personal property of another, of which petitioner was found guilty, was one involving moral turpitude.

2. Whether petitioner, who was placed on probation for a fixed period, has been convicted of a crime within the meaning of the Immigration and Nationality Act of 1952.

STATEMENT

Petitioner, a Canadian citizen, is concededly deportable under Section 241 (a) (2) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251 (a) (2)), *infra,* p. 9, having entered as a visitor in 1936 and overstayed (Pet. 5, App. 74). In May 1957, he applied for suspension of deportation under Section 244 (a) (1) of the same Act (8 U. S. C. 1254 (a) (1)), *infra,* pp. 9–10, which requires, as a condition of eligibility, proof of good moral character for the preceding seven years [2] (App. 50–55).

The special inquiry officer held that the petitioner was ineligible to be considered for such suspension

[2] Petitioner erroneously cites Section 1254 (a) (4) which applies to aliens who "last entered the United States within two years prior to, or at any time after June 27, 1952." Subsection 1 applies to aliens who "last entered the United States more than two years prior to June 27, 1952." Petitioner last entered the United States in 1936 (Pet. 5). However, the questions involved in this case are the same, regardless of which subsection is invoked.

because he had been convicted by an Illinois state court in 1954 of the crime of unlawfully and maliciously burning personal property of another in excess of $25 in value, a crime which the officer ruled to be one involving moral turpitude (App. 17–19). Under Section 101 (f) (3) of the 1952 Act (8 U. S. C. 1101 (f) (3)), *infra*, p. 8, by reference to Section 212 (a) (9) (8 U. S. C. 1182 (a) (9)), *infra*, pp. 8–9, no person convicted of a crime involving moral turpitude may be regarded as having established good moral character for the period in which it occurred. An appeal was taken to the Board of Immigration Appeals and the determination of the special inquiry officer was upheld (App. 11–13).

His administrative remedies exhausted, the petitioner sought judicial review in the United States District Court in Illinois, pursuant to the Administrative Procedure Act (App. 1–6). On motions for summary judgment, the trial judge ruled that the administrative determination was correct in all respects, and that petitioner was not entitled to any relief (App. 73–84). The suit was thereupon dismissed (App. 84). The petitioner appealed to the Court of Appeals for the Seventh Circuit, which affirmed the action of the trial judge (App. 85, Pet. 6, 1a–2a).

ARGUMENT

1. The Court of Appeals decided this case on the ground that the discretionary action of the Attorney General in denying suspension of deportation is not subject to judicial review, citing *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72. Since the Immigration

and Nationality Act states that persons not within the delineated classes need not necessarily be found to possess good moral character (Section 101 (f), 8 U. S. C. 1101 (f), *infra*, p. 8), it might be argued that it was within the discretion of the Immigration and Naturalization Service to find the petitioner not possessed of good moral character for the statutory period, even though he was not automatically barred by Section 101 (f) (3), 8 U. S. C. 1101 (f) (3), *infra*, p. 8. In the alternative, it might be said that the finding of statutory eligibility so blended with the exercise of the discretionary power as to preclude judicial review of the former to the same extent as the latter. However, the Service appears to have found petitioner statutorily ineligible as a matter of law, and not to have exercised any discretion in the matter. The District Court reviewed the administrative decision as presenting an issue of law. It is our position also that, even assuming full judicial review is available, the petitioner has shown no error in the administrative determination.

The petitioner has been found guilty, by a state court in Illinois, of the charge of burning the personal property of another. His contention that this crime does not involve moral turpitude because it would not have been a crime at common law is not persuasive. Many acts which are criminal by statute have been deemed crimes involving moral turpitude though the conduct proscribed did not constitute a common law offense. *E. g., Jordan* v. *DeGeorge*, 341 U. S. 223 (conspiracy to defraud the government of taxes on distilled spirits); *United States ex rel. Popoff* v. *Reimer*, 79 F. 2d 513 (C. A. 2) (fraudulently

aiding alien not entitled to naturalization to apply for citizenship); *United States ex rel. Medich* v. *Burmaster,* 24 F. 2d 57 (C. A. 8) (concealing assets belonging to trustee in bankruptcy). The problem with which the courts have concerned themselves in this area is whether the offense *necessarily* involves moral turpitude. The answer is that the definition of the crime must by its terms involve moral turpitude, *i. e.,* there must be an element of *mens rea* which goes beyond mere knowledge or even intent to commit the acts essential to prove the charge, so that it would not be possible to convict anyone of the crime without a valid inference of moral turpitude. The fact that the circumstances of the *particular* crime may show moral turpitude is not enough.[3] The Illinois statute here in question (Smith-Hurd Ann. St. Ch. 38, § 50) includes the words "willfully and maliciously" and the explanatory case of *Calef* v. *Thomas,* 81 Ill. 478, 481–482, indicates that the statutory offense involves moral turpitude.

2. The petitioner also contends that he was not "convicted" of a crime within the meaning of the Immigration and Nationality Act since he was placed on probation, rather than sentenced to confinement. He was, however, given a fixed sentence of 24 months probation on a finding of guilt which remains of record against him for all time thereafter. This has all the elements of a final conviction. The case of *Korematsu* v. *United States,* 319 U. S. 432, while

[3] See *Ablett* v. *Brownell,* 240 F. 2d 625 (C. A. D. C.); *United States ex rel. Zaffrano* v. *Corsi,* 63 F. 2d 757 (C. A. 2); *Forbes* v. *Brownell,* 149 F. Supp. 848 (D. D. C.)

viewing the problem for different purposes, is authority for the proposition that confinement is not necessary for a defendant to be treated as finally convicted. Illinois treats such a sentence as this as a conviction for the purposes of its Habitual Criminal Statute, *People* v. *Rave*, 364 Ill. 72, and for purposes of impeaching a witness, *People* v. *Andrae*, 295 Ill. 445.

It is also evident that Congress has not made confinement the test of determining a "conviction." Section 212 (a) (9), *infra*, pp. 8–9, makes an exception, from its blanket exclusion of all aliens "convicted" of a crime involving moral turpitude, of aliens who have committed only one such crime more than five years prior to admission "unless the crime resulted in confinement" in which case confinement must have ended more than five years before application. Congress thus showed a clear understanding that conviction would not be synonymous with confinement. Similarly, Section 241 (a) (4), *infra*, p. 9, dealing with deportation of persons convicted of crimes involving moral turpitude, makes a distinction between those convicted within five years for one crime, as to which the alien must be sentenced to confinement or confined, and those aliens "convicted" of two crimes "regardless of whether confined therefor." Congress in these statutes must have had in mind the fact that not all convictions result in confinement. It was specifically legislating with respect to the particular situation presented here—a final conviction which does not result in confinement.

This Court has recognized that the differing probationary schemes of the various states may result in

different consequences, depending on whether the states treat a judgment of probation as a final conviction. In *Pino* v. *Landon*, 349 U. S. 901, Massachusetts characterized its own probationary treatment in such fashion as to remove the odium of conviction from Pino's record. The Immigration and Naturalization Service attempted its own independent characterization but was ordered by this Court, in effect, to accept the characterization of the Commonwealth of Massachusetts. Here, as shown above, the Illinois judgment is treated as a final conviction. And if a uniform federal definition were to be applied, the judgment would, for the reasons already discussed, clearly be a final one under federal law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

OCTOBER 1958.

APPENDIX

The Immigration and Nationality Act of 1952, 8 U. S. C. 1101, *et seq.*, provides in pertinent part:

1. Section 101 (f) (3) (8 U. S. C. 1101 (f) (3)):

> For the purposes of this Act—
>
> No person shall be regarded as, or found to be a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
>
> * * * * * * *
>
> (3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212 (a) of this Act; or paragraphs (9), (10), and (23) of section 212 (a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
>
> * * * * * *
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.
>
> * * * * * *

2. Section 212 (a) (9) (8 U. S. C. 1182 (a) (9)):

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essen-

tial elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admitted if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States;

* * * * *

3. Section 241 (a) (2) and (4) (8 U. S. C. 1251 (a) (2) and (4)):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

4. Section 244 (a) (1) (8 U. S. C. 1254 (a) (1)):

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

* * * * *

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